IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-396

LOUIS JOHNS, Petitioner,

vs.

JOSEPHINE JOHNS, Respondent.

On Petition for Writ of Certiorari To
The Court of Appeals Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Wayne Windle
12th Floor
El Paso National Bank Bldg.
El Paso, Texas 79901

Attorney for Respondent,
Josephine Johns

Of Counsel:

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I. STATEMENT OF FACTS

LOUIS JOHNS by General Warranty Deed absolute on its face onveyed all of his interest in the property made the basis of his suit to JOSEPHINE JOHNS. This conveyance was executed on anuary 18, 1965. Subsequently, in 1971, LOUIS JOHNS prosecuted is suit in the Federal District Court for the Western District f Texas, El Paso Division. JOSEPHINE JOHNS, who received a avorable jury verdict, (see appendix no. 2) defended on the ollowing grounds:

1. She held under a Deed absolute on its face, had held title for more than five years and had paid taxes on the property for more than five years.

2. LOUIS JOHNS had an outstanding judgment against him and when the Sheriff of El Paso County, Texas attempted to execute on the property in question, JOSEPHINE JOHNS, in order to save said property from forced sale, purchase the judgment and to this date continues to make payments on said judgment.

3. Alternatively, that LOUIS JOHNS executed the conveyance for the sole purpose of defrauding his judgment creditor.

4. LOUIS JOHNS at no time gave JOSEPHINE JOHNS any instructi that she was to hold the Deed until he wanted the land back. In fact, the Deed was recorded on January 20, 1965

LOUIS JOHNS failed to adhere to the requisites of Rules ven, Ten, and Eleven of the Federal Rules of Appellate Procedure rsuant to Rule 12 (c) Federal Rules of Appellate Procedure, spondent's timely motion to dismiss the Appeal was granted by e Fifth Circuit Court of Appeals. Re-hearing was denied.

II. NO SPECIAL AND IMPORTANT REASONS EXIST FOR THIS COURT TO GRANT CERTIORARI IN THIS CASE UNDER U. S. SUP. CT. RULE 19, 28, U.S.C.A.

A Writ of Certiorari will be granted only where there are ecial and important reasons therefore. Certiorari should not granted except in cases involving principals, the settlement which is of importance to the public, as distinguished from t of parties, and in cases where there is a real and embarrassi nflict of opinion and authority between Courts of Appeal. Rice Sioux City Memorial Parks Cemetery, 75S. Ct. 614, 349 U. S. 99 L. Ed. 897.

Petitioner asserts that the United States Court of Appeals the Ninth Circuit in Black v. United States, (C. A. Cal. 1959,

F. 2d 38, certiorari denied 80 S. Ct. 379, 361 U. S. 938, Ed. 2d 357, and the United States Court of Appeals for the th Circuit in King v. The Laborers International Union of th America, 443 F. 2d 273 (6th Circuit 1971), have held trary to the United States Court of Appeals for the Fifth cuit in the instant case on the same matter, Respondent ies this assertion.

Defendant in the Black case was a bona-fide pauper as was intiff in the King case. In the instant case, on April 4, 2, Petitioner JOHNS admitted in open court that he was not auper. (see appendix no. 5 & 6). Petitioner JOHNS, then orney of record, admitted in open court that Petitioner HS was not a pauper. (see appendix no. 5 & 6). Contrary to Black and King, the Honorable Court below found that Petitioner HS' application to proceed as a pauper was frivolous and was ely an attempt to make farce of the Federal Rules of Appellate cedure. (see appendix no. 12). Petitioner states in his lication to this Honorable Court, that he was unaware that he in excess of $5,000.00 cash. This is incorrect (see appendix 1). Petitioner received the insurance policies on July 22, , some seven months before he filed his application to proceed forma pauperis. This erroneous statement is typical of tioner's actions in the Trial Court and in the Court of Appeals.

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The insurance policies were not the only assets Petitioner JOHNS owned when his pauper's oath was filed. Petitioner JOHNS under oath stated that he was the District Representative of Jerry Lewis Theaters, Inc., and had purchased an exclusive franchise for movie theaters in the El Paso, Texas area for $25,000.00 cash. Petitioner JOHNS stated that he resides at the Plaza Hotel in El Paso, Texas, and that he makes many business trips to the State of California.

In the King case, Plaintiff was not represented by counsel. Petitioner JOHNS at all times pertinent was represented by employed counsel. Petitioner JOHNS states in his application to this Honorable Court:

"These matters were handled by counsel."

and

"He trusted his lawyer's judgment."

In the Black case, the United States suffered no prejudice and never moved to dismiss the appeal. In the instant case, Respondent timely moved to dismiss Petitioner's appeal. Respondent is of the opinion that Black is not related to the instant case in that said case was criminal in nature and affected the personal liberty of a citizen. It is Respondent's position that no conflict in the opinions of the three Courts of Appeal exist for the primary reason that the pauper's oath on file in this case was frivolous and used solely for the purpose to thwart the Federal Rules of Appellate Procedure.

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III. THIS COURT IN ITS DISCRETION SHOULD DENY THE WRIT

Rule Seven, Federal Rules of Appellate Procedure requires that n Appellant shall file with the Notice of Appeal, bond in the mount of Two-Hundred Fifty Dollars ($250.00). Respondent would how this Honorable Court that Notice of Appeal in this cause as given on January 27, 1972, (see appendix no. 3), that no ttempt was made to file a cost bond until sometime in May of 972 after more than ninety days had expired. Rule Ten, Federal ules of Appellate Procedure requires the appellant to order the ranscript from the reporter within ten days after filing the otice of Appeal. Respondent would show this Honorable Court that o request was made until sometime in May of 1972. Rule Eleven, ederal Rules of Appellate Procedure requires that the transcript nd exhibits necessary for the determination of the Appeal be ransmitted to the Court of Appeals within forty days after the iling of the Notice of the Appeal. Respondent would show this onorable Court that the forty day time period elapsed on March , 1972 and that to date no transcript has been transmitted to he Court of Appeals. Respondent would show this Honorable Court hat no "hiatus" exists in the rules, and that Petitioner's emedy is found in Rule Eleven (d) Federal Rules of Appellate rocedure. All that Petitioner need have done would have been o file a request for an extension of time prior to March 7, 972 in the Trial Court. Petitioner's other remedy would have

been to file his application to proceed as a pauper in lieu of Notice of Appeal, Tillman v. United States, 268 F. 2d 422 (Fifth Circuit 1959). Respondent would show that Petitioner JOHNS failed to file an application for extension under Rule 11 (d) F.R.A.P. until May 8, 1972 (see appendix no. 8), some sixty-two days after the forty day period given by Rule 11 (d) to so file. Petitioner totally failed to adhere to any of the requisites of the rules and now seeks relief of dismissal of his appeal under Rule 12 (c) Federal Rules of Appellate Procedure which dismissal was caused by his own frivolous paupers oath. In Borrow v. Wood, 126 F. 2d 1021 (Fifth Circuit) the Court held that where the transcript was not filed within forty days that the appeal would be dismissed. The Court further holds that in meritorious case irregularities may be overlooked. The instant case by no means is a meritorious case, the outcome affects the instant litigants only, and does not pass upon any matter of fact or law affecting anyone but the litigants. Petitioner could show no meritorious reason, in the Court below, because he was notified by letter of record in this proceeding dated January 29, 1972 (see appendix no. 4) wherein then counsel for Petitioner notified Petitioner of the requirements of Appeal. The time lapse in the instant case occurred because of the negligence of Petitioner, not of his lawyer, and such negligence was attempted to be circumvented by Petitioner's frivolous oath. In Cowden v. Addis, 55 F. 2d 230 (Fifth Circuit) the Court below held that

poverty or lack of funds is not an excuse for failing to print the record and adhere to the appellate timetable. The Court specifically held:

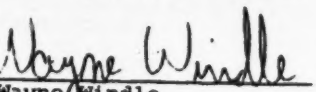
> "There was no need to print the record before filing it, and an appeal in forma pauperis rather than delay in perfecting the appeal is the remedy in cases of poverty."

Further cases following the theories of the above cited cases are: UNITED STATES v. KRAUSE, 197 F. 2d 329, (CCA-9), UNITED STATES v. FUJISAKI, 198 F. 2d 747, (CCA-9), Re: GAMMILL, 129 F. 2d 501, (CCA-7). Appendix number 8 attached hereto sets forth the time sequence that occurred in the Trial Court.

In summary there exists no special and important reasons for this Court to grant certiorari and this Court in its discretion should deny the Application for Certiorari filed by Petitioner. Petitioner, LOUIS JOHNS, attempted to work a fraud on the United States District Court by filing a frivolous pauper's oath solely for the purpose of making a farce of the Federal Rules of Appellate Procedure. He now seeks relief in the Honorable Court for his blatant disregard of the Federal Rules of Appellate Procedure. He further seeks relief by claiming that his attorney failed to counsel him properly. (see appendix no. 4). When, in fact, Petitioner failed to follow the advice of his retained attorney. Respondent takes the position that Petitioner is without clean hands and is entitled to no equitable relief.

WHEREFORE, PREMISES CONSIDERED, Respondent JOSEPHINE JOHNS prays this Honorable Court to deny Petitioner's Application for Writ of Certiorari.

RESPECTFULLY SUBMITTED,



Wayne Windle
12th Floor
El Paso National Bank Bldg.
El Paso, Texas 79901

Attorney for Respondent,
Josephine Johns

Of Counsel:

William A. Elias
1100 Montana Avenue
Suite 201
El Paso, Texas 79902

D. Clark Hughes
606 Myrtle Avenue
El Paso, Texas 79901

CERTIFICATE OF SERVICE

I, WAYNE WINDLE, certify that I am a member of the Bar of the Bar of the Supreme Court of the United States and am attorney of record for Respondent, JOSEPHINE JOHNS, herein. I do further certify that a copy of the foregoing Brief for Respondents in Opposition and Writ of Certiorari has been deposited in the United States Post Office at El Paso, Texas, addressed to Mike

Gibson at 600 Myrtle Avenue, El Paso, Texas 79901, this the 25th day of September, 1972.

Wayne Windle

Wayne Windle

APPENDIX NUMBER 1

RECEIPT

ceived from William A. Elias, The Prudential Insurance Company
f America Life Insurance Policy No. 9192339 on the life of
uis Johns, dated January 20, 1936 issued in Monongahela, Pa.
istrict. Along with New York Life Insurance Company Life Insurance
olicy No. 22 462 713 in the amount of $35,000.00, issued
ecember 24, 1952 on the life of Louis Johns.

RECEIPT DATED this 22nd day of July, 1971.

PEARSON & SPEER

by:

S/ Tom Nations

APPENDIX NUMBER 2

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

LOUIS JOHNS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOSEPHINE JOHNS,	)	
	)	
Defendant.	)	No. EP-71-CA-92

JUDGMENT

BE IT REMEMBERED that on the 13th day of December, 1971, the above styled and numbered cause came on to be regularly called and considered by the Court on the jury docket of the Court, and came the Plaintiff in person and by and through his attorney of recrod, and came also the Defendant in person and by and through her attorneys of record, and all parties having announced ready for trial and a jury of six (6) duly and legally qualified and chosen jurors having been impaneled, selected and sworn to try this case; wherein Plaintiff sought title to the following described real estate, to-wit:

Legal Description.

Thereupon, the trial of this case commenced and the Court and jury having heard the pleadings and evidence introduced upon the trial and the argument of counsel following the close of the

evidence and the case having regularly proceeded until the 14th day of December, 1971, on which date, the case was submitted to the jury upon the Court's oral, general charge. The jury retired to consider its verdict and on the 15th day of December, 1971, returned its verdict to the Court as follows:

"We, the jury, find for the Defendant Josephine Johns."

S/JOHN MACDONALD
Foreman

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff herein LOUIS JOHNS take nothing by his suit.

It is further ORDERED, ADJUDGED AND DECREED by the Court that the Defendant JOSEPHINE JOHNS have and recover from the Plaintiff LOUIS JOHNS, all Court costs in this cause expended.

SIGNED, RENDERED AND ENTERED by the Court on this the 22nd day of December, 1971.

S/JOHN H. WOOD, JR.
United States District Judge

APPENDIX NUMBER 3

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

LOUIS JOHNS, Plaintiff,	)	
vs.	)	
JOSEPHINE JOHNS, Defendant.	)	No. EP-71-CA-92

NOTICE OF APPEAL

Notice is hereby given that LOUIS JOHNS, Plaintiff in the above entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final Order and Judgment overruling his Motion for Judgment not withstanding the verdict and his Motion for New Trial entered herein on the 17th day of January, 1972.

LEE A. CHAGRA
Attorney for Plaintiff
616 E. San Antonio
El Paso, Texas 79901

S/ LEE A. CHAGRA

LAC/oc
cc: United States District Clerk
United States Court House
Room 108
El Paso, Texas 79901

Certified - Return Receipt Requested

APPENDIX NUMBER 4

Mr. Louis Johns
Plaza Hotel
Oregon & Mills
El Paso, Texas

Re: Johns v. Johns
No. EP-71-CA-92

Dear Mr. Johns:

This is to notify you that I have filed Notice of Appeal in the above captioned cause. However, I do not intend to do anything further in regard this matter unless you either execute the agreement you made for my services both on appeal and on the trial or make other arrangements with this office.

As you know, there is a balance due me for representing you on the trial in district court of $2,000.00. I will be happy to release my office file to you or to any attorney of your choice upon receipt of payment.

Also, by copy of this letter to the United States District Clerk, I am confirming the fact that should you continue with your appeal it will be necessary for you to arrange immediately for a $250.00 cost bond as well as taking care of the expenses of completing and filing the record on appeal.

Your truly,

LEE A. CHAGRA

LAC/oc
cc: United States District Clerk
United States Court House
Room 108
El Paso, Texas 79901

Certified - Return Receipt Requested

APPENDIX NUMBER 5

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

LOUIS JOHNS,	§	
Plaintiff,	§	
-vs-	§	
JOSEPHINE JOHNS,	§	
Defendant.	§	NO. EP-71-CA-92

MOTION TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now LOUIS JOHNS, Plaintiff in the above entitled and numbered cause, and respectfully moves the Court for an Order allowing him to proceed in the above entitled and numbered cause in forma pauperis and prosecute his appeal therein to the United States Court of Appeals for the Fifth Circuit, without being required to pre-pay fees or costs or to give security therefor before or after the bringing of these proceedings, and in support of this motion, he tenders the affidavit hereto attached.

The object of this motion is to enable the plaintiff to prosecute his appeal from judgment on jury verdict.

Respectfully submitted,

Lee A. Chagra
616 E. San Antonio
El Paso, Texas 79901

S/ LEE A. CHAGRA
Attorney for Plaintiff

APPENDIX NUMBER 6

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

LOUIS JOHNS	)	
	)	
vs.	)	NO. EP-71-CA-92
	)	
JOSEPHINE JOHNS	)	

JUDGMENT

BE IT REMEMBERED on this 4th day of April A.D., 1972, came on to be heard the Motion of Plaintiff, LOUIS JOHNS, to proceed in forma pauperis, and came the said Plaintiff in person and by and through his Attorney of Record, Lee A. Chagra, and came the Defendant, Josephine Johns, in person and by and through her Attorney of Record, D. Clark Hughes, and the Court having heard the evidence adduced and the argument of Counsel, is of the opinion that the following Order would be proper, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, LOUIS JOHNS Motion for Leave to Proceed in Forma Pauperis should be, and in all things, is denied. The Court further finds that it is without jurisdiction to hear further proceedings in this matter for the reason that the appellate times have expired and as to this Court the Judgment heretofore entered is a final Judgment.

The Court denies the Motion for Leave to Proceed in Forma Pauperis for the following reasons:

(1) James Welshimer, a witness called on behalf of Defendant,

tified under oath as follows:

"My name is James Welshimer. I am the Manager of the El Paso Office of the New York Life Insurance Company. Policy No. 22462713, in the name of Louis Johns, in the face amount of $35,000.00, is in full force and effect and was in full force and effect on the date that Plaintiff filed his Motion to Proceed in Forma Pauperis being February 29, 1972. The current cash value of said policy is approximately $13,965.00. There is approximate loan of $10, 496.00 against said policy which loan was made to Louis Johns, Plaintiff herein. If Mr. Johns came to my office today, I would give him at his request approximately $4,000.00 being the amount of case Mr. Johns still has in said policy."

intiff had no cross-examination of the witness.

(2) Ken Tennison, a witness called on behalf of Defendant,

tified under oath as follows:

"My name is Ken Tennison. I am the Manager of the El Paso Office of the Prudential Life Insurance Company. Policy No. 9192339, in the name of Louis Johns, in the face amount of $10,000.00, is in full force and effect and was in full force and effect on the date that Plaintiff filed his Motion to Proceed in Forma Pauperis being February 29, 1972. If Mr. Johns came into my office today or had he come in on February 29, 1972, I would give him the sum of approximately $1,700.00, which represents the cash he has on deposit under said policy."

intiff had no cross-examination of the witness.

(3) Mr. Lee A. Chagra, Attorney of Record for Defendant, Mr. Louis Johns, Defendant, both admitted in open Court t in light of the status of the record, that Mr. Louis Johns not a pauper.

The reasons above stated are the reasons why this Court denied intiff's Motion to Proceed in Forma Pauperis.

Pursuant to Rule 24, Federal Rules of Appellate Procedure

signed and rendered this 4th day of April, 1972.

S/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX NUMBER 7

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

LOUIS JOHNS,	§	
Plaintiff	§	
vs.	§	No. EP-71-CA-92
JOSEPHINE JOHNS,	§	
Defendant.	§	

MOTION FOR EXTENSION OF TIME TO FILE RECORD

Comes now LOUIS JOHNS, Appellant, and moves that the time within which he may file the record and docket his appeal in this cause be extended. The Order overruling Appellant's Motion to proceed in forma pauperis was overruled on April 4, 1972, at which time the forty (40) day period for docketing the appeal commenced. This Motion is based upon the Affidavit of Appellant and Appellant's counsel attached hereto.

Respectfully submitted,

STUDDARD, MELBY, SCHWARTZ & TUPPER

BY: S/ DON STUDDARD

Filed May 8, 1972

APPENDIX NUMBER 8

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

LOUIS JOHNS, Plaintiff.	)	
vs.	)	NO. EP-71-CA-92
JOSEPHINE JOHNS, Defendant.	)	

JUDGMENT

BE IT REMEMBERED that on this the 10th day of May, 1972, came on to be heard the Motion of Plaintiff, LOUIS JOHNS, for an extension of time to file the record, and came the said Plaintiff by and through his attorney of record, Don Studdard, and came the Defendant, JOSEPHINE JOHNS, by and through her attorney of record, D. Clark Hughes, and the Court having considered said Motion and the argument of counsel is of the opinion that the following Judgment and findings of fact are proper, accordingly,

1) Pursuant to a Jury verdict a take nothing Judgment was entered by the Court against Plaintiff, LOUIS JOHNS, on the 22nd day of December, 1971.

2) Plaintiff's Motion for New Trial and Judgment Not Withstanding the Verdict was denied by the Court on January 17, 1972.

3) Plaintiff gave notice of appeal on January 27, 1972.

4) A Cost Bond pursuant to Rule 7, Federal Rules of Appellate Procedure, was not posted when the Notice of Appeal was filed.

5) No request was made of the Court Reporter to prepare the transcript during the forty (40) day period between January 27, 1972, and March 7, 1972.

6) The transcript was not transmitted to the United States Court of Appeals for the Fifth Circuit during the forty (40) day period of January 27, 1972 through March 7, 1972, contrary to Rule 11, Federal Rules of Appellate Procedure.

7) No request for extension of the time for transmitting the record to the Court of Appeals was filed in the District Court until May 8, 1972, some sixty-two (62) days after the expiration of the forty (40) day period set forth in Rule 11, Federal Rules of Appellate Procedure.

8) On April 4, 1972, this Court entered its Judgment finding that it is without jurisdiction to hear further proceedings in this matter for the reason that the appellate times have expired.

9) On February 29, 1972, Plaintiff filed a Motion to Proceed in Forma Pauperis.

10) On April 4, 1972, Plaintiff's Motion to Proceed in Forma Pauperis was denied in writing by this Court for the following reasons:

(a) The proof at said hearing showed that Plaintiff has in excess of $5,000.00 cash.

(b) The then attorney of record for Plaintiff admitted in open court that he was not a pauper.

(c) Plaintiff, LOUIS JOHNS, admitted in open court that he was not a pauper.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff LOUIS JOHNS' Motion for Extension of Time to File the Record should be, and in all things is denied. The Court further finds that it is without jurisdiction to hear further proceedings in this matter for the reason that the appellate times have expired and did expire on March 7, 1972, and the Judgment heretofore entered on December 22, 1971, is a final judgment.

SIGNED AND ENTERED this 10th day of May, 1972.

S/ JOHN H. WOOD, JR.
United States District Judge

APPENDIX NUMBER 9

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-2070

LOUIS JOHNS,

Plaintiff-Appellant,

vs.

JOSEPHINE JOHNS,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before BELL, DYER and CLARK, Circuit Judges.

BY THE COURT:

Judgment was entered against appellant Johns on December 22, 1971. His motion for new trial or judgment NOV was denied January 17, 1972. Notice of appeal was filed on January 27, 1972, unaccompanied by a cost bond as required by Rule 7, Federal Rules of Appellate Procedure. Johns fuled his motion in the district court to proceed in forma pauperis on February 29, 1972,

which was denied on April 4, 1972. His motion to enlarge the time for filing a transcript was denied by this Court on May 3, 1972 and by the district court on May 10, 1972.

Appelled Josephine Johns has moved to dismiss the appeal. Appellant Johns opposes the motion on the ground that his motion to proceed in forma pauperis made on February 29, 1972 was timely made and that within 40 days after it was overruled on April 4, 1972, he filed a cost bond, filed the record on appeal and ordered the transcript. This is blatant non-compliance with the rules.

Appellant Johns did nothing from January 27, 1972 (notice of appeal filed)to February 29, 1972 (motion to proceed in forma pauperis), a period of 33 days, although Rule 7 required him to file a cost bond and Rule 10 (b) required him, absent a pauper status, within 10 days to order a transcript from the reporter. We hold that appellant's motion to proceed in forma pauperis was not timely made. Furthermore, the district court's judgment of April 4, 1972 makes an affirmative finding that at the hearing on appellant's motion to proceed in forma pauperis the proof showed that he had in excess of $5,000.00 cash; his attorney admitted in open court that appellant was not a pauper; and appellant himself admitted in open court that he was not a pauper. Nevertheless, appellant urges that he is entitled to 40 days from April 4, 1972 (or May 24, 1972) to file a transcript, and then admits that it was not ordered until May 8 and has not

yet been filed.

We will not permit a frivolous motion to proceed in forma pauperis to make a farce of the requirements of the Federal Rules of Appellate Procedure. Nor will we ignore orders of this Court and the district court denying an enlargement of time to file a transcript.

The motion of appellee Josephine Johns to dismiss the appeal is granted.

DWS

TBB

CC